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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARLENE YVONNE MERCHAIN,

Defendant and Appellant.

B205510

(Los Angeles County
Super. Ct. No. GA068305)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Rafael A. Ongkeko, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Arlene Yvonne Merchain guilty of attempted murder, assault with a deadly weapon, and first degree burglary in the stabbing of Francisco Leon. Merchain appeals, arguing that there was insufficient evidence that she committed burglary or that she had the intent to kill when she stabbed Leon. We affirm.

BACKGROUND

Merchain and her husband Edwin Smith owned a home in Monterey Park, California. Leon (whose late brother had children with Merchain's daughter) and Leon's girlfriend, Mary Jane Morales, lived in a back bedroom and bathroom of the home. Merchain suffered from a seizure disorder after a bike accident and took Phenobarbital daily to control her seizures. In lieu of paying rent for the room, Leon and Morales helped Merchain to care for herself and did chores around the house. Their room was connected to the kitchen by an iron door with a lock and had two doors to the outside of the house, one in the back and one on the driveway. Merchain, Leon and Morales were friendly and sometimes took heroin together.

On December 28, 2006, Leon was sleeping on his bed, and Morales left the house. Leon awoke to pain in his chest, saw blood, and realized he had been stabbed. He told the police he saw Merchain standing above him with an 18-inch knife. He looked in the bathroom mirror and saw the stab wound, grabbed some napkins, put pressure on the wound, and walked out the door to the driveway. Leon asked his next door neighbors to get help and sat down on the curb.

When the police arrived, Merchain was sitting on the front lawn wearing a bathrobe stained with blood. She was dazed and seemed confused. Leon pointed at Merchain and told police "That bitch stabbed me" with a "kitchen knife." He said the knife was still in the house, and one of the officers found a bloody stainless steel serrated knife with a 12-inch blade in Merchain's kitchen sink, in a pan filled with water. The officers called an ambulance for Leon and for Merchain, who after being handcuffed and placed in the police car slumped over and appeared to stop breathing. Morales told one

of the officers that she had been outside and heard a female voice shout, “‘I’m going to stab you.’”

At the hospital, doctors found that Leon had been stabbed in the chest. The wound, three centimeters deep, was stopped from going into his heart by his sternum, but penetrated his chest cavity and collapsed his right lung. He was in the hospital for three or four days with a tube in his lung to drain blood. Merchain had a high level of Phenobarbital in her system, more than three times the therapeutic dose. Leon told an officer that he had locked his bedroom door and fallen asleep, woke up in pain to see Merchain standing above him with the knife, and ran out of the house. He thought Merchain must have come in through a window. Merchain told a nurse, “‘I stabbed a man I know with [a] knife.’”

Merchain was charged with one count of attempted murder in violation of Penal Code sections 187, subdivision (a), and 664; one count of assault with a deadly weapon in violation of Penal Code section 245; and one count of first degree burglary in violation of Penal Code section 459. After a trial at which Leon and Morales testified, a jury found Merchain guilty on all counts and found true special allegations of great bodily injury and use of a deadly and dangerous weapon. The court sentenced Merchain to seven years in prison on count one, attempted murder, plus three years for the great bodily injury enhancement. The court stayed sentence on the other counts, struck the punishment for the weapon enhancements, and imposed fines and restitution. Merchain appeals.

ANALYSIS

I. There was sufficient evidence to convict Merchain of burglary.

Merchain argues that there was insufficient evidence to support her conviction for burglary. She contends that she and her husband owned the house, and she could not be convicted of burglarizing it. Merchain did not raise this issue at trial, and she has therefore waived it on appeal.

The evidence established that Merchain committed burglary as defined by the instructions given at trial. The court gave the following burglary instruction: “To prove

that the defendant is guilty of [burglary], the People must prove that[:] [¶] 1. the defendant entered a room within a building; and [¶] 2. when she entered a room within a building, she intended to commit attempted murder and/or assault with a deadly weapon. . . . [¶] A burglary was committed if the defendant entered with the intent to commit attempted murder and assault with a deadly weapon.” The court also instructed the jury that, “First degree burglary is the entry of an inhabited house or a room within an inhabited house or part of a building. A house or part of a building is inhabited if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry. [¶] A house includes any structure that is attached to a house and functionally connected with it.” Merchain did not object to these instructions, and on appeal, she “fails to identify any incorrect statement of the law within the instructions given,” so she has waived any challenge to them. (*People v. Parson* (2008) 44 Cal.4th 332, 352 [“[I]f defendant believed the instructions required clarification or modification, it was incumbent upon [her] to request it”].)

Whether waived or not, however, there was substantial evidence at trial that Merchain’s entry into Leon’s room constituted burglary, despite her ownership of the home. A defendant entering a room to which he has “an absolute right of entry” cannot be guilty of burglary. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 421). Penal Code section 459 is designed to protect a possessory right in property, and the burglary laws exist to punish ““the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence”” (*Ibid*; *People v. Gauze* (1975) 15 Cal.3d 709, 715.)

The evidence in this case established that Leon had a possessory interest in the room he rented from Merchain. Leon testified that he rented a room with its own bathroom from Merchain, with a back door leading outside to the back yard, a side door leading outside to the driveway, and a door connecting to the kitchen that was usually kept locked. In trade for the room, Leon and Morales took care of Merchain and helped

around the house. Leon told the police that he had locked the bedroom's door to the kitchen before he fell asleep, and that Merchain had probably climbed in a window (although he did not remember these statements at trial). The police found the bedroom's back window open, with the screen removed. Morales confirmed that the couple rented the room in exchange for providing home care services to Merchain. Leon therefore could refuse Merchain entry at the threshold, and Merchain did not have an absolute right to enter the room. (*People v. Davenport* (1990) 219 Cal.App.3d 885, 891.)

Further, there was ample evidence that Merchain entered Leon's and Morales's rented room with the intent to commit attempted murder or assault with a deadly weapon. (We discuss the sufficiency of the evidence of intent in the section below.) Leon awoke in his bed with a pain in his chest and saw he had been stabbed and was bleeding; when the police arrived, Merchain was in the front yard with blood on the inside and outside of her bathrobe; Leon told the police Merchain had stabbed him, and she told a nurse at the hospital she had stabbed someone she knew. The police found a bloody knife in Merchain's kitchen sink. Viewing the entire record in the light most favorable to the prosecution (*People v. Navarette* (2003) 30 Cal.4th 458, 498), we conclude there was sufficient evidence to support Merchain's conviction of burglary.

II. There was sufficient evidence that Merchain formed the intent to commit murder.

Merchain argues (as she did at trial) there was insufficient evidence to support the jury finding her guilty of attempted murder, a crime that requires the specific intent to kill, because the amount of Phenobarbital in her system rendered her incapable of forming the required intent. “[E]vidence of the inability to *form* a particular mental state due to intoxication is not admissible. . . . [W]e will assume defendant is arguing that the evidence of intoxication established [the] actual lack of the necessary mental state, rather than [the] inability to form that state.” (*People v. Navarette, supra*, 30 Cal.4th at p. 498; *People v. Parson, supra*, 44 Cal.4th at p. 349, fn. 7.)

Evidence was presented that Merchain took one to two tablets of Phenobarbital daily to control her seizures. Tests at the hospital after the stabbing showed, however, that she had three or four times the therapeutic level of Phenobarbital in her system, consistent with having ingested 10 to 13 tablets. Merchain's treating physician testified that high levels of Phenobarbital could induce a coma, cause hyperalertness or anxiousness, and could impair judgment as well as cause disorientation. He also testified that Merchain's regular use of the medication might increase her tolerance for a large dose. The prosecution presented a toxicologist's expert testimony that at the tested level a patient would normally "be either in a coma or dead," and that the fact that Merchain was conscious had to be the result of increased tolerance. The expert testified that effects varied individual to individual, and that the level tested for at the hospital did not prove what Merchain's level was at the time of the stabbing (and that it might have been lower). The court gave the jury an instruction stating that voluntary intoxication could be considered in determining whether Merchain formed the specific intent necessary for attempted murder.

Viewing the entire record in the light most favorable to the prosecution (*People v. Navarette, supra*, 30 Cal.4th at p. 498), the evidence was sufficient for the jury to conclude that Merchain's intoxication did not prevent her from forming the specific intent to kill Leon. Merchain entered Leon's room and stabbed him deeply in his chest while he slept. Neither Merchain's doctor nor the toxicologist testified that the Phenobarbital necessarily would have left Merchain so impaired as to be unable to form the intent to kill. A police officer testified that Morales told him she had heard a female shout, "I'm going to stab you." There was also evidence that Merchain remembered the stabbing. The nurse at the hospital testified that Merchain stated she had stabbed someone she knew, and Merchain later told her doctor that she stabbed Leon "over money matters." There was thus ample evidence that Merchain purposefully stabbed Leon. (See *People v. Turk* (2008) 164 Cal.App.4th 1361, 1379-1380 [evidence is insufficient to show defendant was unable to form intent due to intoxication where there was evidence of purposeful provocation of fight with victim and no evidence that

defendant lacked recollection of events preceding killing].) We conclude the evidence was sufficient to allow the jury to conclude that Merchain was capable of intending, and did in fact intend, to murder Leon by stabbing him in the chest.

DISPOSITION

The judgment is affirmed.

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WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.